STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE HONORABLE LISA GORCYCA
Oakland County Circuit Court Judge

Respondent.

Docket No. 152831
Formal Complaint No. 98

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BRIEF OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, MICHIGAN CHAPTER, AND OAKLAND COUNTY BAR ASSOCIATION, AS *AMICI CURIAE*, IN SUPPORT OF THE HONORABLE LISA GORCYCA'S CORRECTED PETITION TO REJECT OR MODIFY, IN PART, THE RECOMMENDATION OF THE JUDICIAL TENURE COMMISSION

ORAL ARGUMENT REQUESTED

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AMICI'S STATEMENT OF QUESTIONS PRESENTED

1. Should this Court reverse the Judicial Tenure Commission's finding of misconduct against Judge Lisa Gorcyca for alleged intemperate language towards children appearing before her, when Judge Gorcyca's actions were undeniably not persistent or habitual, and where such finding is having and will continue to have a chilling effect of the fair administration of justice?

   Amici answer: **Yes**.

2. Should this Court reverse the Judicial Tenure Commission's finding of misconduct against Judge Lisa Gorcyca for allegedly abusing her contempt power, when Judge Gorcyca's actions were at worst, an error of law, and where such finding is having and will continue to have a chilling effect of the fair administration of justice?

   Amici answer: **Yes**.

STATEMENT OF FACTS/OVERVIEW

Amici, the Michigan Chapter of American Academy of Matrimonial Lawyers, ("AAML-Mich") and the Oakland County Bar Association ("OCBA"), adopt the Statement of Facts set forth in the Honorable Lisa Gorcyca's Corrected Petition to Reject or Modify, in part, the Recommendations of the Judicial Tenure Commission. The AAML-Mich and the OCBA additionally set forth the following supplement to the adopted Statement of Facts.

While judicial temperament is a fundamental aspect of the American judicial system, imposing differing perceptions of proper judicial temperament can have a chilling effect on judges' willingness to enforce their own orders. The AAML-Mich and the OCBA respectfully suggest that the foregoing statement is more true in the area of family law than in any other area of the law. It is often said: "In criminal cases, judges see bad people at their best; and in family law cases, judges see good people at their worst." In family law, where emotions often run high, judges require both broad authority to issue orders and a full arsenal of powers to implement their orders. They cannot and should not be burdened by "political correctness". Indeed, one of the cornerstones of our judicial system is the recognition that judges provide justice for all, including, when appropriate, supporting the minority or unpopular causes.

In courtrooms, throughout this state, judges have been utilizing a "scared straight" approach to have juvenile offenders (and even potential juvenile offenders) spend time in a courtroom or a jail in order to deter improper conduct. The hard-nosed speeches that judges routinely give in these scenarios are not rosy or comforting; rather, they are pointed, and often outright scary. Yet those judges are not hailed to answer before the Judicial Tenure Commission. Rather, judges who utilize a stern "scared straight" approach are routinely praised

for their judicial temperament, recognizing that some harsh words at an early stage, might prevent a more serious problem at a later date.

The Amici and the JTC continue to disagree as to whether Judge Gorcyca acted contrary to appropriate judicial temperament on or about June 24, 2015, but neither group disagrees that on the other 1500-plus days of her distinguished judicial career, Judge Gorcyca intelligently exercised her authority to issue orders, she effectively utilized her powers to enforce her orders, and that she did so in a way that made the bench and bar in Oakland County proud of her judicial temperament.

On June 24, 2015, after five years of escalating warnings, Judge Gorcyca utilized her contempt powers to enforce her parenting time orders. After years of utilizing what some might consider a "too compassionate" approach toward these children, on this date, she utilized a "scared straight" approach, consistent with her powers to maintain the integrity of her orders. Her conduct on June 24, 2015, was neither habitual, nor persistent; nor in the opinion of the AAML-Mich and the OCBA, contrary to appropriate judicial temperament.

The AAML-Mich and the OCBA are concerned with both aspects of the Judicial Tenure Commission's recommendation: finding misconduct for (1) alleged intemperate comments and (2) for allegedly committing an error in her application of contempt. Such findings have the likely effect of chilling a judge's willingness to enforce orders through the use of their contempt powers or from allowing our judges to express their frustrations borne out of the matter before them. In a light most favorable to the Judicial Tenure Commission, Judge Gorcyca *may* have committed a potential procedural error of law when conducting a contempt hearing. Contrary to the opinion of the Special Master, an error of law is not – and should not be – the basis for judicial misconduct. In Michigan, three judges on the Court of Appeals review a trial judge's

decision for error. At times, the trial judge's decision is reversed for an error of law. In none of those cases, has the trial judge been prosecuted by the Judicial Tenure Commission. In some of those cases, the Michigan Supreme Court reversed the Michigan Court of Appeals. In none of those cases, has the appellate panel come before the Judicial Tenure Commission to answer for their legal errors. In a few cases, the United States Supreme Court reversed the Michigan Supreme Court. In none of those cases has this Court been prosecuted by Judicial Tenure Commission and asked to answer for its legal errors. Appellate courts exist to correct legal errors which happen in courtrooms across this country every day. The Judicial Tenure Commission does not exist for that purpose.

In reality, this particular case is nothing more than a sensationalized headline followed by a disingenuous prosecution. The most obvious proof came in the opening statement of the Judicial Tenure Commission's prosecutor. Elevating form over substance, the prosecutor opened her case excoriating Judge Gorcyca for having the children taken from her courtroom in handcuffs. The *uncontradicted* testimony of several witnesses during the hearing, including a deputy from the Oakland County Sheriff's Office, was that the Oakland County Sheriff's Office is solely responsible for taking persons into custody in its courtrooms, and it is the unwavering policy of the Oakland County Sheriff's Office that anybody, child or adult, who is taken into custody in a courtroom will be handcuffed, not only for the safety of those around them, but for the detainee's own safety. Judges in Oakland County have no say whatsoever in how people being detained are removed from their courtrooms. Not only did the Judicial Tenure Commission fail to produce any evidence to support its opening statement, but it must have known that the content of its opening statement was patently false, inflammatory, and

misleading. Nonetheless, the Judicial Tenure Commission's prosecutor grandstanded on this falsehood, as well as many others, as an officer of the court in a public forum.

Looking at the underlying divorce case, not just as a 20 minute snapshot, but as a five year video, Judge Gorcyca, did everything that was expected of her as a judge and as a public servant of the state. In the opinion of the AAML-Mich and the OCBA, she is as compassionate, patient, and practical as any family court judge in this state. We believe that there are many other judges across the state who would have reacted in a more dramatic or draconian fashion several years earlier if confronted with the same facts. Judge Gorcyca did everything a judge could be expected to do and beyond to help these children see the world in a more appropriate healthy way, i.e. their best interests. When Judge Gorcyca decided that additional measures were necessary to reunite this broken family, including respect for her orders, she temporarily placed the children in what she reasonably believed was a better (and less toxic) environment pursuant to the authority granted to her by virtue of her position on the bench.

As noted, the AAML-Mich and the OCBA hold Judge Gorcyca in high regard. We are concerned that this proceeding has been unfair to her. Equally, if not more important, is the undeniable fact that judges around this state are aware of these proceedings and if this can happen to Judge Gorcyca under these circumstances, it can happen to any other judge of this state. Judicial misconduct should be reserved for serious, habitual, persistent malfeasance, and not be applied because we disagree with the mode or manner in which a fine judge carries out her duties.[1]

[1] The AAML-Mich authors of this brief sat through Judge Gorcyca's entire hearing before the Special Master and through the entire hearing before the Judicial Tenure Commission. We heard all of the testimony, and we saw all of the evidence. More importantly, we have not just reviewed the snapshot of 20 minutes on one day of a five year divorce case, but have considered

ARGUMENT

Whether to grant an *amicus* request are decisions within the discretion of this Court. This brief highlights the negative effect to the orderly administration of justice emanating from the Judicial Tenure Commission's finding of misconduct by Judge Gorcyca. That finding, if allowed to stand, will negatively impact the integrity of the judicial system and the public at large.

1. This Court should reverse the Judicial Tenure Commission's finding of misconduct against Judge Lisa Gorcyca for alleged intemperate language towards children appearing before her, when Judge Gorcyca's actions were undeniably not persistent or habitual, and where such a finding is having and will continue to have a chilling effect of the fair administration of justice.

The Judicial Tenure Commission found fault with Judge Gorcyca for her use of intemperate language towards the Tsimhoni children. As noted above, however, this incident, if improper at all, was an isolated incident. As a result, if allowed to stand, judges throughout this state, will be subject to misconduct if they express their frustration in a way that the Judicial Tenure Commission subjectively deems too harsh, even in isolated circumstances. The instant prosecution is even more egregious, when considering the totality of the case:

- This case spanned more than five years;
- Judge Gorcyca tried numerous remedies to help this family and the children;
- Judge Gorcyca had multiple opportunities, and even requests to hold the children in contempt at an earlier date and refrained from so doing;
- The children showed a blatant disregard for Judge Gorcyca's authority, not just on the day in question, but throughout the proceedings.

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the extraordinary length of this case and have seen firsthand Judge Gorcyca's eight year distinguished judicial career.

The issue of judicial frustration often times arises in the context of litigant requests for judicial disqualification. As this Court is aware, litigants often seek to disqualify a judge on the basis of bias for hostile or unfavorable comments made by a trial judge during the course of a particular case. Such attempts are routinely rejected as this Court has recognized that it is at times appropriate, and certainly not disqualifying for a judge, to express his or her frustration. This exact issue was raised and rejected in *Cain* v *Dep't of Corr*, 451 Mich 470; 548 NW2d 210 (1996). In recognizing the potential for judicial expression of frustration, this Court noted:

> "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . [Further], not establishing bias or partiality . . . are, expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display. [*Liteky*, 127 L. Ed. 2d 474, 114 S. Ct. 1147.]"

Id. at 496-97, fn. 30.

This Court went further to note:

> "The difficulty is that we live in an imperfect world. We therefore judge the actions and responses of a trial court in the light of the situation with which he is confronted. He stands in our eyes garbed with every presumption of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years. [*Mahlen Land Corp v Kurtz*, 355 Mich. 340, 350-351; 94 N.W.2d 888 (1959).]"

Id. at 497, fn. 31.

As recognized in *Cain*, expressions of impatience, dissatisfaction, annoyance ***and even anger*** are within the bounds of what frustrated people, even judges, sometimes display. In light of that, in the context of disqualification matters, this Court has recognized that judges should be cloaked in a presumption of fairness and integrity, especially those like Judge Gorcyca, who has exemplified those characteristics during her tenure on the bench.

Despite these clear presumptions that would apply to Judge Gorcyca in a disqualification setting, the Judicial Tenure Commission treated Judge Gorcyca as a multiple repeat offender, taking a 20 minute hearing out of context, and then finding her guilty of misconduct because the Commission disagreed with the strength in which Judge Gorcyca expressed her frustration, that was building over the previous five years. In this proceeding, no favorable presumption was applied to Judge Gorcyca, nor was any effort made to place her actions into context.

This Court has made clear that to ignore context is not an appropriate way to evaluate a judge's actions, yet the Commission did just that. ("We therefore judge the actions and responses of a trial court in the light of the situation with which he is confronted.") *Id*.

Moreover, not only has this Court recognized that expressions of frustrations borne out of the context of a particular case are generally acceptable, if not appropriate, the Standards of Judicial Conduct appear to imply that same recognition. MCR 9.205 provides:

> "(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, ***persistent*** failure to perform judicial duties, ***habitual*** intemperance, or conduct that is clearly prejudicial to the administration of justice."

Id. (emphasis added).

In the face of this rule, and the case law allowing for judicial expression of frustration with a person before them, the Judicial Tenure Commission nonetheless, proceeded with action against Judge Gorcyca and asks this Court to affirm its findings of misconduct. If that occurs, the Judicial Tenure Commission and this Court will be inundated with petitions seeking to have misconduct for intemperate language assessed against multitudes of judges throughout this state.

Making matters worse, the Judicial Tenure Commission either ignored, or failed to recognize, the nature of family law proceedings. Unfortunately, family law proceedings are

often the most contentious proceedings in our civil court system. Other than criminal law, family law makes up the largest percentage of attorney grievances. *State of Michigan, Attorney Grievance Commission Annual Report, January 1, 2015 to December 31, 2015, Table 1(Exhibit 1,* p 3*).* The very nature of these proceedings presents the lawyers and trial judges with problems that do not lend themselves to easy answers.

Judge Gorcyca could have taken the easy way out on parenting time for these children and left the family to fend for itself.[2] Instead, Judge Gorcyca chose to roll up her proverbial sleeves and try her best to address this most difficult problem, all designed to address the long-term best interests of these children. See generally, *MCL 722.27(a)(1).*

We as lawyers need judges who do not take the easy way out. We need judges to express frustration towards the parties before them, when appropriate. It affords the practitioner the ability to better counsel and cajole his or her client, if that client knows that failure to conduct themselves in a reasonable manner might result in harsh action by the trial court. The finding of the Judicial Tenure Commission has severely altered this dynamic. And the effect of this change will not be insignificant.

The AAML-Mich and the OCBA, in adopting the Statement of Facts set forth in Judge Gorcyca's petition before this Court, expressly seek to highlight certain appendices to that brief.

- Appendix 31: Even the Judicial Tenure Commission noted the unusual nature of the bar support behind Judge Gorcyca. Appendix 31 is a small sample of that support. Of particular note, in Appendix 31, is a letter written by several prominent family law practitioners. In that letter, they note, much of what is already before this Court, that Judge Gorcyca went the extra mile, that she did

[2] Notably, Judge Gorcyca's refusal to give up on these children has paid dividends. They now enjoy parenting time with both parents.

more than what many other judges would have done and that she tried, in her compassionate way to help this family and these children, children who became her wards when the case was filed.

- Also notable in Appendix 31 are many of the comments from supporters of Judge Gorcyca"
    - "This is the mark of a great leader and jurist. I know many people who would have taken the coward's way out. You didn't."
    - "I would like to say you are my Hero. Thank you for having the courage to do something."
    - "All the family court systems in the country need more judges like you. Keep up the good work. I so wish you had been the judge in my case."
    - "She is one of our best jurists, especially, as it relates to the advancement and protection of children, and your reader's deserve to know this."

The AAML-Mich and the OCBA reference these as a highlight to the daily battle that takes place in family courts. As noted, litigants and lawyers need a judge who is willing to work with them, dig down and try to find solutions to these difficult and unique problems. If the Judicial Tenure Commission's recommendation is adopted, the AAML-Mich and the OCBA fear that fewer judges will be willing to take that next step, and families and children throughout Michigan will suffer as a result. Even worse, many will likely resist serving in the family law division completely.

2. This Court should reverse the Judicial Tenure Commission's finding of misconduct against Judge Lisa Gorcyca for allegedly abusing her contempt power, when Judge Gorcyca's actions were at worst, an error of law, and where such finding is having and will continue to have a chilling effect of the fair administration of justice

The Judicial Tenure Commission's finding of misconduct against Judge Gorcyca for her effort to control the contemptuous behavior in her courtroom has had, and will continue to have, if left unchecked, a chilling effect on a trial judge's willingness to use, or threaten to use her contempt power. While the AAML-Mich and the OCBA recognize that contempt is an awesome power to be used sparingly, it is the threat of contempt that maintains order in our court system. See *e.g. Griev Adm'r* v *Feiger*, 476 Mich 231, 252; 719 NW2d 123 (2006) "given that a court's contempt power, enforceable by fine or incarceration pursuant to MCL 600.1711(1), is always available to restore or maintain order when the offending conduct or remarks occur before the judge in the courtroom."

The Judicial Tenure Commission's prosecution of Judge Gorcyca, in the first instance, was flawed. Michigan jurisprudence is littered with the decisions from its higher courts overturning a trial court's issuance of a contempt citation. Yet those judges did not face the wrath of the Judicial Tenure Commission.

It is also without legitimate dispute that repeated public attacks on our judges has a deleterious effect on the ability of the judiciary to function. As noted in *AMERICAN BAR ASSOCIATION SECTION OF LITIGATION WINTER LEADERSHIP MEETING MAUI, HAWAII 5 JANUARY 1998 ATTACKS ON JUDGES - A UNIVERSAL PHENOMENON The Hon Justice Michael Kirby AC CMG[*] A UNIVERSAL PHENOMENON*:

> "It is because courts are obliged to protect the rights of unpopular individuals and minorities that they are exposed, in elected democracies, to political castigation. If judges are to perform their functions when the going gets rough, they need tenure to underwrite their independence.

> Personal courage may not always be enough. Even with tenure, ambition or thirst for popularity may sometimes get in the way. Judges may sometimes wilt under the barrage of criticism…"
>
> "*Some too far:* Having acknowledged the legitimacy of public debate about cases and issues, criticism of decisions and attention to judges who are lazy, slow, incompetent or rude, it remains to be said that the current level of political and personal attacks on the judiciary is unacceptable. It has gone too far. Unless there is a measure of mutual restraint, the judicial institution will be damaged and judicial integrity undermined. When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who should know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention. Generally, judges cannot answer back. At least most cannot do so in effective forums. From inexperience their attempts to respond sometimes result in compounding their problems and demeaning their office."

Id. at p 7 (*Exhibit 2*.)

Contempt has been defined as a "willful act, omission or statement that tends to impair the functioning of a court. *Arbor Farms, LLC* v *Geo Star Corp*, 305 Mich App 374, 387; 853 NW2d 421 (2014). The purpose of a trial court's contempt power is to preserve the effectiveness and sustain the power of the courts. *Id*. Moreover, even if the underlying order issued by the Court is improper, the failure to follow that order is an appropriate basis for upholding a contempt finding. *Estate of Grable* v *Brown (In Re Dudzinski)*, 257 Mich App 96; 667 NW2d 68 (2003).

In *Estate of Grable*, Henry Joseph Dudzinski twice appeared before the Court wearing a t-shirt that read "Kourts Kops Krooks". The trial judge ordered him to remove the shirt or leave the courtroom. Mr. Dudzinski refused and was held in contempt and ordered to spend 29 days in jail (which he did). Ultimately, the matter was elevated to the Court of Appeals which

determined that the underlying order of the trial court to remove the shirt was erroneous and infringed on Mr. Dudzinski's First Amendment rights. Nonetheless, the *Grable* Court affirmed the contempt finding. In doing so, it stated:

> "In the present case, appellant willfully disobeyed the trial court's order to remove his shirt or leave the courtroom. Appellant was on notice and understood what the trial court was ordering him to do, but still refused to obey the order. The trial court found appellant in contempt only after having given him several chances to obey its order. 'A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date.' *Kirby v. Michigan High School Athletic Ass'n, 459 Mich 23, 40; 585 N.w.2d 290 (1998)*."

Id. at 110.

As discussed more fully in Judge Gorcyca's principal brief, the issuance of contempt in this circumstance was within the bounds of Judge Gorcyca's appropriate authority. She issued an order to the three Tsimhoni children. In her presence, they refused to comply with the order. Even if the order was incorrect, the orderly administration of justice does not afford anyone, even minors, from boldly and willfully refusing to obey that order. Moreover, although the Special Master limited evidence at the hearing as to the full nature of the underlying case, the contempt citation issued by Judge Gorcyca was a small piece of a five year odyssey where Judge Gorcyca attempted to fix a clearly broken family.[3]

The Judicial Tenure Commission's finding of misconduct in this case, threatens the exact inherent power that provides the backbone for the orderly administration of justice. Judges cannot be fearful of a misconduct petition against them if they seek to maintain compliance with their orders and seek to maintain decorum in their courtrooms.

[3] The family division was created as a "one judge, one family" bench so that the trial court could more fully understand all that was occurring within a particular situation and work with the situation to better serve the public.

> "Civil disobedience is not the appropriate course of action when a person disagrees with a court order. We are a society of laws and the legal remedy available to appellant was to seek leave to appeal the trial court's order precluding him from wearing his shirt…A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal. ***Allowing such behavior would encourage noncompliance with valid court orders on the basis of misguided subjective views that the orders are wrong. There exists no place in our justice system for self-help.***"

Id. at 111, emphasis added.

The fact that the Judicial Tenure Commission chose to prosecute this undeniably "isolated" event in Judge Gorcyca's courtroom, both in the context of this five year case and in the context of her entire history on the bench, calls into serious questions the political motives behind the prosecution, *ab initio*. And as noted above, our judges need to be free from political intervention in the performance of their duties or face diminished effectiveness and a demeaning value to the office itself.[4] Absent the untethered ability to control the courtroom, judges will face the very civil disobedience and self-help that the *Estate of Grable*, *supra*, makes clear is inappropriate. The AAML-Mich and the OCBA request that this Court reverse the findings of the Judicial Tenure Commission and reserve such misconduct petitions for intentional and repeated misuse of judicial power.

CONCLUSION

The AAML-Mich and the OCBA respectfully request that this Court refuse to adopt the recommendation of the Judicial Tenure Commission and enter a finding of no misconduct by

[4] The undisputed facts establish that the Examiner for the Judicial Tenure Commission subpoenaed and reviewed videos in which Judge Gorcyca placed children in Children's Village and found no similar instances of "misconduct," nor did they find an abuse or overuse of her contempt powers. Moreover, the investigative arm of the Judicial Tenure Commission sought the assistance of attorneys who appear before Judge Gorcyca to enlist support from outside influences. And, it is known that contact was made with the Israeli consul, all highly unusual and politically driven actions which call into question the very type of undue influence which will undermine the very effectiveness of trial court's throughout this state.

Judge Gorcyca.

Respectfully submitted,

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Dated: January 12, 2017

PROOF

The undersigned certifies that a copy of the foregoing document was served upon counsel of record via the Court's efiling system on January 12, 2017

/s/ Tracy L. Guellec

EXHIBIT 1

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

Annual Report

January 1, 2015 to December 31, 2015

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(As of 12/31/15)

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Investigative Specialist:	Yulanda Burgess
Paralegals:	Erin Farler Kimberly Billings
Investigative Assistant:	Natasha Kakish
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Intake Assistants:	Demetra Eason Monica Garza Barbara Todd
Administrative Assistant:	Yulette Barnes
Receptionist:	Margarita Kipreos
File Clerk:	Consuelo Gonzalez

State of Michigan

Attorney Grievance Commission

Annual Report

January 1, 2015 – December 31, 2015

Overview

The Attorney Grievance Commission was established by the Michigan Supreme Court on October 1, 1978, succeeding the former State Bar Grievance Board. The Commission acts as the prosecutorial arm of the Supreme Court for the discharge of its constitutional responsibility to supervise and discipline Michigan attorneys. The Commission exercises state-wide jurisdiction and is located in the city of Detroit.

Commission Composition

The Commission consists of nine members, who serve without compensation. The six lawyers and three non-lawyers are each appointed by the Michigan Supreme Court for a term of three years. A member may not serve more than two terms.

The Commission's Chairperson and Vice-Chairperson are appointed to one-year terms by the Michigan Supreme Court. The Commission's Secretary is elected by its members.

- **Barbara B. Smith, Chairperson** - term ending 10/1/16
- **Charles S. Kennedy, III, Vice-chairperson** - term ending 10/1/16
- **Jeffrey T. Neilson, Secretary** – term ending 10/1/17
- **Rev. Douglas Ward Gallager, Lay person** – term ending 10/1/16
- **Pastor R. B. Ouellette, Lay person** – term ending 10/1/17
- **Valerie R. White, Attorney member** – term ending 10/1/18
- **Victor Fitz, Attorney member** – term ending 10/1/16
- **Kenyetta N. Stanford, Attorney member** – term ending 10/1/18
- **Cathy Joan Pietrofesa, Lay person** – term ending 10/1/18

The Grievance Administrator's Staff

The Grievance Administrator and Deputy Administrator are appointed by the Supreme Court pursuant to MCR 9.109. The Grievance Administrator is empowered under MCR 9.111 to hire legal and support staff, with the approval of the Commission. During the year 2015, the Grievance Administrator supervised a staff of thirteen attorneys, two investigators and eighteen administrative and clerical staff. Additionally, the Commission accepts law students for a legal intern program in connection with their respective law schools.

Commission Procedures

The grievance discipline process is governed by Subchapter 9.100 of the Michigan Court Rules. The disciplinary process is normally initiated when a Request for Investigation is filed with the Administrator against an attorney, or when the Grievance Administrator commences an investigation in his/her own name.

Upon the filing of a Request for Investigation, the Grievance Administrator must determine whether there exists a *prima facie* allegation of professional misconduct. The Request for Investigation may be rejected by the Grievance Administrator after preliminary investigation and/or analysis by the Intake Unit, or it may be assigned to a staff counsel for a full investigation. Common investigative procedures include legal research and analysis, witness interviews, and/or the procurement of court records or banking records. When such an investigation is concluded, the Grievance Administrator must submit the investigative file to the Commission for its review and disposition.

In each investigative file referred to the Commission, the Grievance Administrator may recommend to the Commission that: (1) the matter be closed as there is insufficient evidence of professional misconduct; (2) the Respondent attorney be placed on contractual probation, a diversion program where minor misconduct is significantly related to alcohol or other substance abuse, or other impairment, pursuant to MCR 9.114(C), (3) the Respondent attorney be admonished MCR 9.114(B), a confidential disposition requiring the attorney's consent or (4) authority be granted to file a formal complaint against the Respondent attorney for allegations of professional misconduct pursuant to MCR 9.114(A)(2). The Administrator must inform the complainant and the Respondent, if the Respondent answered the Request for Investigation, of the final disposition of every Request for Investigation MCR 9.114(F).

Investigations

During 2015, the Commission docketed **2208** Requests for Investigation [grievances]. This number includes **194** Requests for Investigation generated under the Trust Account Overdraft Notification (TAON) rule, which requires notification to the Grievance Administrator by a financial institution when an attorney has overdrawn his or her client trust account. Appendix A (page 13 of this report) includes a 10 year comparison of the Requests for Investigation filed since 2006.

As shown in Table 1 (below), the areas of practice most likely to lead to a grievance are criminal law, domestic relations, probate, and personal injury law.

Table 1 – Nature of underlying legal matter in grievances filed, 2015 and 2014

Subject Matter	% of Total Grievances 2015	% of Total Grievances 2014
Criminal law	37.8	29.5
Domestic relations	13.83	15.93
Probate law	9.02	9.88
Commercial litigation	3.8	9.1
Bankruptcy law	4.21	9.11
Real estate transactions	1.64	6.92
Insurance law	1.0	4.74
Immigration law	1.63	n/a
Employment/labor law	2.0	4.50
Personal Injury	9.63	n/a
All Others	15.44	10.32

Table 2 (below) compares the final disposition of the grievances resolved by the Grievance Administrator or the Grievance Commission in 2015 compared to 2014. The **2208** dispositions in 2015 included **1,819** grievances dismissed by the Grievance Administrator pursuant to MCR 9.112(C)(1)(a) and MCR 9.114(A)(1); **293** grievances closed by the Commission; **163** admonitions issued by the Commission; **27** contractual probations approved by the Commission; **158** individual grievances approved by the Commission for the filing of a formal complaint; **22** judgment of convictions were filed by the Commission.

Table 2 – Disposition of Grievances, 2015 and 2014

	2015	2014
Total Grievances Received	2208	2872
Total Grievances Disposed	2482	2945
Rejected by the GA or Closed in Intake	1819	2243
Total Disposed of by the Commission after full investigation	663	702
Closed by the Commission	293	405
Admonishments	163	137
Contractual Probation	27	25
Approved for Formal Complaints	158	135
Approved for Judgment of Conviction	22	20

There were **724** open investigative files pending with the AGC on January 1, 2015. On December 31, 2015, the open investigative caseload was **586**.The dispositions of grievances for a particular year are not necessarily dispositions of all grievances filed for that year. The dispositions for 2015 included grievances filed before January 1, 2015, and some of the grievances filed during the year were pending on January 1, 2016.

AGC CASE SUMMARIES

Grievance Administrator v Mark R. VanderMolen, ADB Case No: 15-93-AI

Assistant Deputy Grievance Administrator: Cynthia C. Bullington

Respondent VanderMolen, a former assistant prosecuting attorney, received a three year suspension from the practice of law due to his conviction for aggravated stalking which had been filed in the Kent County Circuit Court. Respondent was originally charged with sexual assault, but Respondent pled to two charges of criminal sexual conduct. In arriving at its determination, the panel noted that Respondent did not have a history of prior discipline.

Names subject to confidentiality, companion files both resulting in admonishments.

Senior Associate Counsel: Stephen P. Vella

Respondents were co-counsel for a plaintiff who suffered a substantial assault and battery by the corporate defendant's employee. Respondents obtained an impressive settlement for the client notwithstanding substantial challenges in showing liability on the part of the corporate defendant. The issue, however, was whether their costs of $60,000 were excessive. The costs included expenditures that are traditionally considered part of a law office's overhead, such as secretarial expenses, rental of office space, and time spent conducting research. In addition, some of the expenses were estimates without supporting documentation. Respondents agreed to reimburse the client over $30,000 of costs previously deducted from the gross amount of the settlement.

Grievance Administrator v Wayne Kristall, ADB Case No. 14-73-GA

Senior Associate Counsel: Rhonda S. Pozehl

Investigation of a trust account overdraft notification revealed that Respondent improperly handled and misused his IOLTA. Respondent wrote checks from his IOLTA that were either personal or business related and unrelated to any client matter that Respondent was handling. Additionally, Respondent kept monies in his IOLTA that were personal in nature, i.e. monies from the sale of a property jointly owned by Respondent and his wife. The hearing panel found that Respondent held funds other than client and third person funds in a IOLTA, in violation of MRPC 1.15(a)(3); and deposited his own funds in the client trust account in excess of an amount reasonably necessary to pay for financial institution service charges or fees or to obtain a waiver of service charges or fees, in violation of MRPC 1.15(f).

Grievance Administrator v Marvin Barnett, ADB Case No. 14-8-GA; 14-26-GA; 14-53-GA

Senior Associate Counsel Frances A. Rosinski

On September 11, 2015, an Order of Suspension and Restitution was issued suspending Respondent Barnett for three years and requiring a total of $67,500 in restitution to be paid within 30 days of the effective date of November 3, 2015 for a wide of range of misconduct in three separate client representations, including intimidating a witness during a federal criminal trial, mistreating a Wayne County prosecutor during a trial, engaging in misrepresentation and deceit, neglect, commingling, failing to use a client trust account for the advance payment of fees and failing to communicate with his clients. The Grievance Administrator's prosecution was presented over the course of six hearings.

Grievance Administrator v Gary Fields, 15-66-GA

Senior Associate Counsel Frances A. Rosinski

On October 22, 2015, an Order of Disbarment and Restitution was issued disbarring Respondent Fields and requiring a total of $49,775.60 to be paid by November 13, 2015 for a range of misconduct, primarily misappropriation of client funds, neglect and failing to refund unearned fees in eight client matters while he was employed first at the law firm of Eisenberg, Benson and Fields and then at the law firm of Johnson Law Firm. Respondent Fields did not answer the formal complaint and was defaulted. The hearing convened on August 24, 2015 with the Grievance Administrator ready to present his case. Respondent Fields appeared at the hearing with counsel and signed a stipulation to disbarment and restitution, which the panel accepted on the record.

Grievance Administrator v George Cassar, ADB Case No. 15-16-GA

Senior Associate Counsel: Emily A. Downey

Tri-county Hearing Panel #63 issued an order of Disbarment, effective October 21, 2015. Respondent admitted to misappropriating approximately $198,000 from an estate. Respondent moved the money between various personal accounts. He eventually returned the money, resigned from his firm, and self-reported to the Attorney Grievance Commission. The panel found that the mitigating factors cited by Respondent had no real mitigating effect and found that disbarment was the appropriate sanction.

Grievance Administrator v Donna Jaaskelainen, ADB Case No. 14-105-GA

Senior Associate Counsel: Kimberly L. Uhuru

Upper Peninsula County Hearing Panel #1 issued an Order of Suspension and Restitution with Conditions suspending Respondent for 179 days, effective March 18, 2015. Respondent, while serving as the elected Keewenaw County Prosecutor, neglected several civil matters, causing three client's cases to be dismissed in court. Respondent also failed to answer a Request for Investigation. Respondent was ordered to make restitution to her client and to return client files. On September 2, 2015, the Attorney Discipline Board increased the suspension to 180 days, requiring Respondent to prove to a hearing panel by a preponderance of the evidence her fitness to return to the practice of law. As a result of the order of discipline, Respondent has participated in an evaluation and treatment through the Lawyers and Judges Assistance Program.

Grievance Administrator v Michael Aho Kennedy, ADB Case No. 14-68-GA

Senior Associate Counsel: Dina P. Dajani

Emmet County Hearing Panel #2 issued an Order of Disbarment, effective March 13, 2015. In his capacity as a trustee of his elderly client's trust, Respondent embezzled more than $1,000,000 and used the money for his personal benefit. For this conduct, Respondent was sentenced on February 22, 2016, to 6 to 20 years of imprisonment for embezzlement in excess of $100,000 in the Emmet County Circuit Court. Additionally, Respondent pleaded guilty to mail fraud and making and subscribing to a false amended U.S. individual tax return (2009) for which he will be sentenced by the U.S. District Court for the Western District of Michigan on April 11, 2016.

Grievance Administrator v Kevin J. Reiman, ADB Case No. 15-9-GA

Senior Associate Counsel: Dina P. Dajani

A formal complaint was filed against Respondent alleging, among other things, that he misappropriated money from a client. The Bay County Prosecutor, at about the same time the formal complaint was filed, also brought criminal charges against Respondent involving allegations of theft from other clients. Because of the concurrent prosecutions, and in the effort to protect the public, a Petition for Injunction was sought in the Supreme Court to preclude Respondent from practicing law while the criminal prosecutions remain pending. On September 18, 2015, the Supreme Court issued an order granting the injunction enjoining Respondent from practicing law in the State of Michigan until the felony charges pending against him have concluded.

Grievance Administrator v Edward L. Johnson, ADB Case No. 15-47-GA

Senior Associate Counsel: Todd A. McConaghy

Effective November 8, 2015, Respondent was disbarred following a determination that he violated an order of discipline as well as failed or refused to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so. It was also determined that Respondent failed to notify active clients in writing of the suspension of his license, failed to notify tribunals/parties in litigated matters of the suspension of his license (as well as withdraw), failed to file proof of compliance with MCR 9.119, practiced law following the suspension of his license, had contact with clients following the suspension of his license and held himself out as an attorney following the suspension of his license.

Grievance Administrator v Richard Meier, ADB Case No. 12-29-GA

Senior Associate Counsel: John K. Burgess

Respondent was found to have neglected two legal matters after collecting "non-refundable" fees. The Panel found that Respondent's contracts were ambiguous as to whether the fees were actually non-refundable or just advanced flat fees. Respondent was suspended for 30 days. While the Attorney Discipline Board modified the Order of Discipline to a reprimand and found that Respondent's fee was actually non-refundable, the Board ordered restitution of $4,000 to the complainant as a sanction for the misconduct committed. The Board's finding in this regard was notable, as it is distinguishable from the Board's established power to order fee forfeiture where collection of the fee resulted in part from the misconduct itself. The Board's finding that restitution can be ordered as a sanction even in the case of a non-refundable fee alleviates any impediment from the Grievance Administrator effectively seeking and obtaining orders of discipline in such cases.

Prosecutions and Other Litigation

A. Proceedings before Hearing Panels of the Attorney Discipline Board.

When the Commission authorizes that a prosecution be commenced, a formal complaint is filed with the Attorney Discipline Board (ADB) setting forth the alleged misconduct, pursuant to MCR 9.115. The matter is scheduled before a hearing panel of three volunteer lawyers appointed by the ADB. Upon the conclusion of the hearing, the panel must issue an order dismissing the complaint or imposing public discipline which may include probation, reprimand, license suspension or disbarment. The Grievance Administrator filed **85** formal complaints in 2015, compared to **77** filed in 2014. Appendix A (page 13) includes a 10-year comparison of the formal complaints filed with the Attorney Discipline Board.

The Grievance Administrator is also empowered by MCR 9.120 to initiate Judgment of Conviction (JOC) proceedings against attorneys who are convicted of a crime. These proceedings are show cause proceedings in which the level of discipline is the principal issue. Attorneys who are convicted of a felony are automatically suspended from the practice of law until a hearing panel of the ADB has issued a final order of discipline. Attorneys who are convicted of misdemeanors are not automatically suspended. The Grievance Administrator will regularly file a JOC proceeding for a felony conviction, while exercising discretion to initiate a JOC proceeding for a misdemeanor conviction. The Administrator filed **31** new matters in 2015 based on an attorney's criminal convictions, compared to **17** convictions filed in 2014.

Attorneys who are disciplined in other jurisdictions (state or federal) will be subject to a reciprocal discipline proceeding initiated by the Grievance Administrator pursuant to MCR 9.120(C). These proceedings, like JOC proceedings, resemble a show cause proceeding in which the principal issues are whether the attorney received due process in the underlying litigation and whether a reciprocal discipline should be imposed. Reciprocal proceedings were instituted in **0** cases in 2015, compared to **6** in 2014.

The Grievance Administrator is also a participant in ADB reinstatement proceedings initiated by attorneys who have been suspended for more than 180 days in accordance with MCR 9.124(C). The burden of proof is on the attorney to establish his or her fitness by clear and convincing evidence. In those cases, the Grievance Administrator must conduct an investigation and file a written report with the hearing panel. The Grievance Administrator may contest the petitioner's eligibility for reinstatement. Fifteen (**15**) state reinstatement petitions were filed in 2015, compared to **15** in 2014.

Finally, the Grievance Administrator may seek an order from the ADB declaring that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability, or because of addiction to drugs or intoxicants, either by filing proof that the attorney has been judicially declared incompetent or by alleging incapacity in a complaint to be adjudicated by a hearing panel. The Grievance Administrator instituted **6** such proceedings in 2015, compared to **2** in 2014.

B. Appeals and Other Proceedings.

Review by the Attorney Discipline Board:

The Grievance Administrator, as well as the respondent attorney and the complainant, may file a petition with the Attorney Discipline Board (ADB) seeking review of the hearing panel's decision. During the year 2015, the ADB ruled on **21** petitions for review following briefing and oral arguments presented by the Administrator and the Respondent. The Grievance Administrator, the Respondent, and the complainant may appeal a decision by the Attorney Discipline Board to the Supreme Court which may, in its discretion grant leave to appeal.

Appeals to the Supreme Court:

The Grievance Administrator is a party in complaints for superintending controls filed with the Michigan Supreme Court by complainants who disagree with the decisions of the Grievance Administrator or the Commission to reject or close an investigative file. The Grievance Administrator filed an appearance in **22** matters filed with the Supreme Court in 2015.

Reconsideration:

Apart from the formal review or appeal processes, the Grievance Administrator has a long-standing policy of accepting requests for reconsideration of files dismissed by the Administrator through the Intake Unit. This process acts as a quality control measure while providing further accountability to complainants. Upon the receipt of a request for reconsideration, a senior attorney will review the file and determine whether an issue or a relevant fact was overlooked by the Intake Unit, or whether new information has been provided that could change the analysis or outcome of the matter. If such information is provided, the file may be reopened for further investigation.

Receiverships:

Under MCR 9.119(G), if an attorney leaves the practice of law (whether or not for disciplinary reasons), disappears, or is deceased and there is no person capable of conducting the attorney's affairs, the Grievance Administrator may file a petition for receivership with the circuit court in the county where the attorney maintained his or her office. In those cases, the Grievance Administrator acts as receiver, or co-receiver with the assistance of a local attorney, and must undertake a work-intensive process that includes cataloging and prioritizing the abandoned files, contacting clients, courts and opposing parties if there is a pending matter, and taking other action in order to protect the interests of clients. The Grievance Administrator opened **12** new receivership files in 2015, **15** receiverships were closed during the year, **26** open receivership files were pending at the end of the year.

Federal Reinstatement Proceedings:

The Grievance Administrator may be requested to participate in discipline or reinstatement proceedings in a federal district court. For example, the District Court of the Eastern District of Michigan regularly appoints the Administrator as an interested party in reinstatement proceedings involving lawyers who have been suspended from practice under the local rules of that court. In 2015, the Administrator appeared in **9** discipline or reinstatement proceedings conducted in the U.S. District Court for the Eastern District.

Pro Hac Vice Administration:

Under the current provisions of MCR 8.126, the AGC is tasked with processing requests for temporary admission in Michigan by out-of-state attorneys on a pro hac vice basis. In 2015, each pro hac vice applicant was required to file the proper documentation along with a fee of $105.00 (a fee equal to the discipline and client protection portions of the annual dues paid by a Michigan attorney). For each applicant, the AGC must, within 7 days, determine whether the applicant has been granted limited admission in the last 365 days and provide said information to the appropriate court administrative agency or tribunal. In 2015, the AGC processed **628** pro hac vice motions with total costs charged to the applicants in the amount of **$63,280.00**.

Funding

The Attorney Grievance Commission receives no public funds. The Commission and the Attorney Discipline Board are funded primarily from the discipline portion of the mandatory dues paid by all active members of the State Bar of Michigan. In 2015, annual dues for active members were **$305**, of which **$110** (36%) was specifically allocated to the two discipline agencies. Effective fiscal year 2015, the discipline portion of the dues will be $90.00 (32% of the annual dues assessment). For the fiscal year, which ended September 30, 2015, the combined operating expenses of the Attorney Grievance Commission and the Attorney Discipline Board were ***$5,062,695***. The Attorney Grievance Commission's operating expenses for the fiscal year 2015 were **$3,980,016**.

Contact Information

For further information regarding the Attorney Grievance Commission, please contact:

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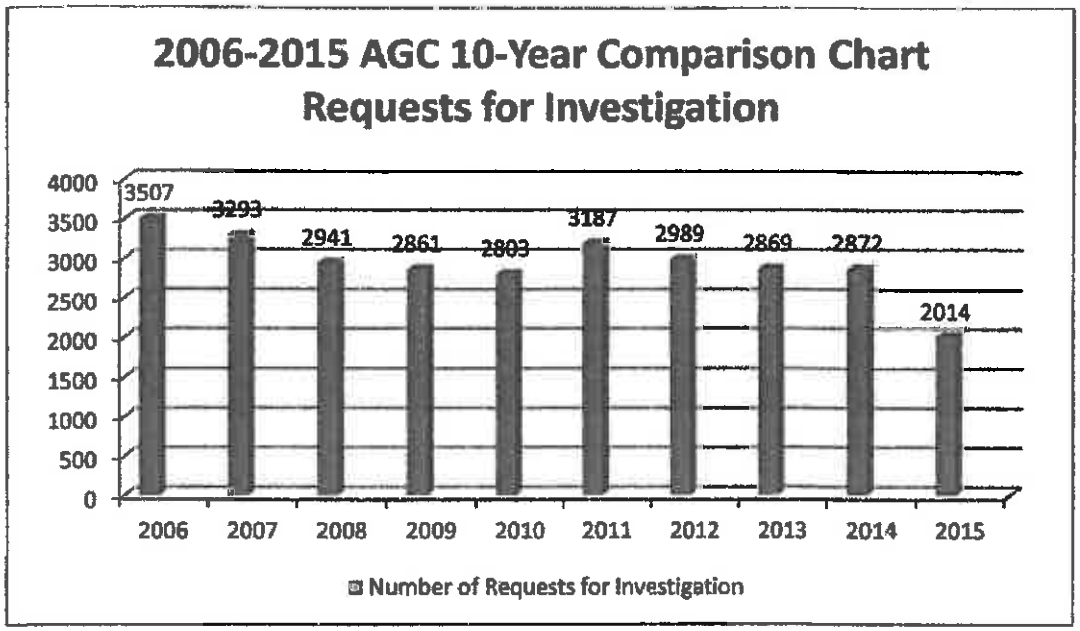
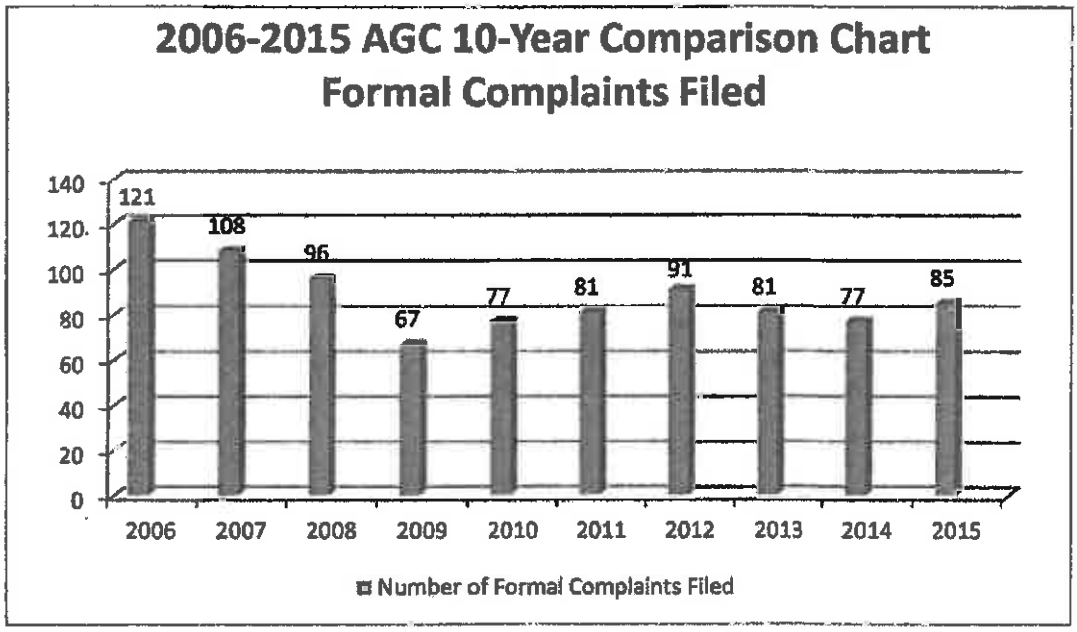
Alan M. Gershel
Grievance Administrator

Barbara B. Smith
Chairperson, AGC

Appendix A





Appendix B

Attorney Grievance Commission
Comparative Statement of Expense
2015 and 2014

Line Items	2015	2014
Salaries	$ 2,234,132.00	$ 2,192,266.00
One Time Distribution (.5%)	$ 454.00	$ 10,961.00
Payroll Taxes	$ 170,712.00	$ 168,547.00
Employee's Insurance	$ 440,000.00	$ 440,000.00
Retiree Health Care	$ 211,915.00	$ 211,915.00
Pension Contributions	$ 306,150.00	$ 326,150.00
Rent	$ 154,656.00	$ 160,800.00
Electricity	$ 15,510.00	$ 15,510.00
Parking	$ 5,000.00	$ 5,000.00
State Bar Bookkeeping Fee	$ 31,540.00	$ 32,486.00
Payroll Processing Fee	$ 10,700.00	$ 11,021.00
Witness and Subpoena Fees	$ 46,690.00	$ 46,690.00
Receivership Expenses	$ 10,000.00	$ 10,000.00
Machine Rental	$ 40,920.00	$ 45,920.00
Meetings	$ 4,700.00	$ 5,200.00
Travel	$ 22,000.00	$ 22,000.00
Telephone	$ 14,000.00	$ 14,000.00
Books, Dues and Subscription	$ 15,500.00	$ 16,000.00
Office Supplies	$ 30,000.00	$ 30,000.00
Printing and Stationery	$ 4,000.00	$ 4,000.00
Postage	$ 38,000.00	$ 30,000.00
Directors and Officers Insurance	$ 42,368.00	$ 44,063.00
Liability Insurance	$ 5,252.00	$ 5,462.00
Technology Expenses	$ 30,000.00	$ 30,000.00
Repairs and Maintenance	$ 14,000.00	$ 15,000.00
Dues	$ 5,900.00	$ 5,900.00
Continuing Education	$ 4,000.00	$ 8,000.00
Capital (office) Expenditures	$ 25,000.00	$ 25,000.00
Miscellaneous	$ 3,000.00	$ 3,000.00
Total	$ 3,936,099.00	$ 3,934,891.00
Depreciation	$ 44,371.00	$ 50,000.00
Total	$ 3,980,016.00	$ 3,984,891.00

EXHIBIT 2

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION WINTER LEADERSHIP MEETING MAUI, HAWAII 5 JANUARY 1998 ATTACKS ON JUDGES - A UNIVERSAL PHENOMENON

The Hon Justice Michael Kirby AC CMG*

A UNIVERSAL PHENOMENON

Introduction

In the last decade, in many countries of the common law, the general deference formerly paid to judges, has been eroded. Attacks on judges have now become commonplace. Many are now made by politicians who see mileage in that course. But beyond politicians, the attacks have been made by the media, public commentators, academics and members of the legal profession, the last omitting to dress up their words in the respect for the judicial office which were formerly obtained.

In the United States the most serious feature of the phenomenon has been the intensely political character of much of the criticism. The retiring President of the American Bar Association, Mr N Lee Cooper observed, on the eve of leaving office, that it was his view that the biggest challenge to the legal profession and justice system of the United States "is the continuing attack upon our federal judiciary". As I shall illustrate, he could have widened that focus to the attacks upon the State judiciary as well. At least the federal judiciary enjoys constitutional protections provided by the wisdom of the Founders of the United States Constitution who, even two hundred years ago, saw the dangers. Many State judges in the United States are specially vulnerable to removal from office. Some have suffered that fate for performing no more than their judicial duty.

United Kingdom

In the United Kingdom, from whose judiciary common law countries ultimately derive their model, the deference paid to Her Majesty's judges has lately begun to decline. The man who is now the Lord Chancellor called attention, in a speech in the House of Lords in June 1996, to "unprecedented antagonism" occasioned by what he described as "a major clash over the distinct roles of parliament, ministers and the judges. He condemned "judicial invasion of the legislature's turf". He called the judges of the United Kingdom back to A V Dicey's submission to the absolute supremacy of parliament.

The media of Britain fell upon the differences which emerged between the last government and the senior judiciary, taking "delight in both highlighting - and, one suspects, fuelling - the split between judiciary and government". The Beaverbrook press claimed that there was a "sickness sweeping through the senior judiciary - galloping arrogance". With just a little *hubris,* the editorialist declared that "[w]hile European Human Rights judges, some from countries which once sent political prisoners to Siberia, are venting their spleen on Britain, legal weevils here at home are practising their own brand of mischief". The Rothermere press joined in with comments that seem astonishing to lawyers from the United States and Australia, brought up in the tradition of constitutional review:

> "Now it seems that any judge can take it on himself to overrule a Minister, even though Parliament might approve of the Minister's action. This is to arrogate power to themselves in a manner that makes a mockery of Parliament. ... The judges are giving the impression that they are acting on a political agenda of their own."

The Times, once the bastion of the Establishment in Britain, under new management, demanded that a new Chief Justice be appointed who could "steer his profession away from the sound of gunfire".

The more courageous and articulate members of the English judiciary, such as Sir Stephen Sedley, answer back. They remind those who have forgotten about the peril of supine judges. They call in aid Sir Edward Coke's assertion of the sovereignty of the courts in the face of the Crown's prerogatives. They caution against mob rule. Increasingly, they draw on United States experience in the refurbishment of the constitutional institutions of Britain. Sometimes their leaders rise in the House of Lords to defend the judiciary from attack and to espouse its causes. Because of our notion of the separation of powers, that facility is unavailable to judges in the United States and Australia. The forums available to us are rather more limited.

New Zealand

In New Zealand, in recent times, the old deference has also taken something of a battering. Judges have been castigated ferociously for bail decisions which went wrong. They have been prosecuted for false travel claims. They have been attacked for failing to respond to media criticism. When the Chief Justice, in a public speech, cautioned against:

> "The increasingly strident cries of the well heeled sector of the community, pressuring Government and the judiciary as to the particular brand of justice they seek, are not a pretty sight either, nor are the supportive noises made by acolytes in the profession."

he was denounced in the *New Zealand Law Journal,* of all places, for getting into politics, damaging the independence of the judiciary and insulting the legal profession.

Australia

The debates in Britain and New Zealand seem positively genteel by comparison to those which have engaged the Australian judiciary in the past year or so. The problem is a general one. But it came to the fore after the High Court of Australia, the nation's federal supreme court, decided in December 1996 that the native title to land of the indigenous peoples of Australia was not, as a matter of law, necessarily extinguished by the pastoral leases granted by the Crown and under statute over vast areas of the Australian continent beginning in the 19th century. The decision was by a majority of four to three of the Justices of the seven member Court. As a result, politicians in both Federal and State Parliaments appeared to compete with each other to attack the Court and especially the majority judges. Few indeed demonstrated any familiarity with what the judges had written. A senior Federal Minister singled my reasons out for special castigation, declaring that he was "underwhelmed" by them. A State Premier described them as nothing more than "rantings and ravings". The attacks, the like of which we have never seen before in Australia, continued for months, unrepaired by any defence of the Court by the traditional political guardian of judicial independence, the Attorney-General. He stated that he did not agree with the convention that the Attorney-General should defend the courts from criticism. They must, he declared, find ways of defending themselves. For this, he, in turn, was criticised by judges and retired judges. The politicians maintained their attack. Some do to this day.

The derogatory comments of politicians soon became the springboard for academic and media castigation. Recent High Court decisions, the Court and the justices were labelled "bogus", "pusillanimous and evasive", guilty of "plunging Australia into the abyss", a "pathetic ... self-appointed [group of] Kings and Queens", a group of "basket-weavers", "gripped ... in a mania for

progressivism", purveyors of "intellectual dishonesty", unaware of "its place", "adventurous", needing a "good behaviour bond", needing, on the contrary, a sentence to "life on the streets", an "unfaithful servant of the Constitution", "undermining democracy", a body "packed with feral judges", "a professional labor cartel". There were many more epithets of a like character, many stronger.

These attacks eventually called forth defences of the High Court of Australia by judges and retired judges, the organised legal profession, leading members of the Bar, a former Governor-General, legal academics, a few members in Parliament, selected editorialists and even a law student. One professor warned of the consequences of such a prolonged confrontation between Executive Government and the judiciary in Australia. He did so on the basis of the experiences of the land of his birth, Malaysia, in 1988 when the highest judge was driven from office. The Chief Justice of Australia, in an unusual move, wrote a private letter to the Acting Prime Minister to correct the erroneous suggestion, made publicly, that the Court had deliberately delayed its decision in the pastoral leases case. Promptly, this letter was secured by journalists (presumably knowledge of its existence was leaked in Parliament) under the *Freedom of Information Act.* It was given widespread publicity. Later, at a series of legal conferences in Australia and overseas, the Chief Justice of Australia spoke of the dangers of such sustained attacks on the judiciary. From the United States, Kathryn Graham wrote to the Australian press to castigate the "disappointing lack of understanding of the role of the Court". The Chief Justice of Australia's most populous State, New South Wales, in October 1997, called for a truce and for mutual respect between the branches of government. But the debate and the attacks go on.

The feature of the Australian debate that has concerned many lawyers has been the complete shift from the bipartisan political acceptance of constitutional and other important decisions of the Court which had marked Australia's history in the past, even when those decisions were extremely important and controversial. There is also the concern that such an unrelenting barrage of criticism and denigration would, if unabated, undermine the community's confidence in the courts and acceptance of court decisions. Editorialists might declare that "robust legal debate [is] good for [the] country". But a lot of judges and lawyers, unused to such unrelenting assaults, had their doubts.

United States of America

The prize for the worst examples in a developed country in this ***genre*** of political attack on the judiciary must go to the United States of America. Of particular concern to outsiders (and possibly to citizens as well) has been the appearance of federal political leaders, looking around for themes for their electoral campaigns, selecting the easy targets of the judiciary as a means of promoting themselves as tough on law and order.

Senator Robert Dole's call for the impeachment of Judge Harold Baer of the United States District Court and his consignment of United States Appeals Judge Rosemary Barkett to his "judicial hall of shame" did not work very well as an electoral theme once it was pointed out that the Senator had voted in the Senate to confirm 97% of President Clinton's judicial nominees. But the gravest attacks in the United States have been made by State politicians seeking to punish judges for decisions in criminal, and particularly death penalty cases which tend to engender strong public passions. The Governor of Tennessee (Mr Don Sundquist), after effectively securing the removal of Justice Penny White from the Supreme Court of that State by electoral recall, declared that judges *should* be looking over their shoulders to see whether the same would happen to them. This assertion drew the retort of Justice John Paul Stevens of the United States Supreme Court, speaking at the 1996 ABA annual meeting:

> "It was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."

There have been a number of cases in other States of the United States. They include the removal of Chief Justice Rose Bird and two other Justices of the Supreme Court of California, and Justice James Robertson who was voted off the Mississippi Supreme Court in 1992. The action of Judge Baer, in changing his ruling after the heat of political pressure was applied may have been unconnected with that pressure. But it certainly did not look good.

Fundamental human rights defend the right of every person in a cause affecting them to be heard by an independent, neutral and unbiased judge. The Declaration of Independence of the United States listed amongst the grievances against King George III that "He has made judges dependant on his Will alone, for the tenure of their offices ...". Constitutional decisions uphold the promise of judicial independence. It is also guaranteed in international law by the *International Covenant on Civil and Political Rights*. However, political pressure, applied with a fair measure of brutality, to secure particular results from sitting judges, undermines the principle of independent, neutral and impartial justice according to law. It is no more to be tolerated where the brutality is verbal than where it is physical.

One of the features of the United States attacks on the judiciary which is most disturbing to an outsider is the way they have been followed up by removal from office, or threats of impeachment, of judges who require popular retention or re-election votes. Another concern is the complete misrepresentation of judicial opinions and serious over-simplification of complex issues. Yet another are reports of elected judges in the United States running for office or re-election on the boast that they are "*too* tough on criminals".

The truth and the detail about controversial cases tend to elude headstrong politicians on the campaign trail. A particular concern is the failure of leading political officer-holders to speak up to defend judicial independence. A United States commentator has asked, in relation to Senator Dole's call for the impeachment of Judge Baer: "Where was Senator Orrin Hatch, a lawyer and the Chairman of the Senate Judiciary Committee when this attack was made?" The answer given is:

> "Unfortunately, he was not defending the independence of the judiciary. After Baer reversed his ruling, Hatch told reporters 'Unfortunately this sort of attention cannot be brought to bear on all of the other soft-on-crime decisions issued by other activists that President Clinton has appointed'".

The author went on:

> "Similarly, those in the Democratic Party should have taken President Clinton - a former constitutional law professor - to task for the suggestion that he might call for Baer's resignation because he disagreed with Baer's decision".

For anyone wanting to read the catalogue of United States equivalents to the Australian list of verbal denigration recently hurled at the judiciary, a good starting point is the article by Judge Joseph W Bellacosa of the New York State Court of Appeals. "Screwballs" is the kindest of the epithets. Judge Bellacosa concludes:

"Judges can take criticism, I am very confident, but whether the public interest can stand and absorb mal-informed, drum-beaten and heated attacks on the judicial process is worth pause and reflection."

ASSESSMENT OF THE STORM

What can be said about the period we are living through, illustrated, in several jurisdictions, by the examples which I have cited?

1. *Always some criticism:* It is wrong to think that criticism of the judiciary is completely new. In the United States, under the protection of the First Amendment, the media and politicians commonly said nasty things about particular judges. For example, when Hugo Black was nominated by President F D Roosevelt to the Supreme Court, the Chicago *Tribune* declared that "If he wanted the worst man he could find, he has him". In *News Week,* a commentator was quoted as saying: "There have been worse appointments to high judicial office; but, with Rodgers and Hart, I can't remember where or when". The *Washington Post* said that the nomination combined "lack of training on the one hand and extreme partisanship". Black went on to distinguished service on the Court. It is a little ironic (but not perhaps entirely surprising) that it was he who said in *Chambers v Florida* that courts serve:

> "[A]s havens of refuge for those who might otherwise suffer because they are helpless, weak, out numbered, or because they are ... victims of prejudice and public excitement."

In England, a memorandum from the Permanent Secretary to the Lord Chancellor's Department, recently disclosed, asserted:

> "In recent years ... it has been difficult for the State to obtain justice from the judges of the High Court. It is not too much to say that in recent years, the weight of prejudice against the State in the minds of many members of the Court of Appeal and judges of the High Court has been such as seriously to affect the administration of justice.

This was not written during the current debates. It was penned in March 1929 to the first Lord Hailsham who was Lord Chancellor in Stanley Baldwin's first administration. However, in the England of that time the opinion was privately expressed and kept so for decades.

In Australia, as in Britain, the law of contempt, in the form of "scandalising the court", imposed a measure of restraint on attacks on judges, particularly where it was considered that the statement was an attempt to influence specific court proceedings. However, from the outset, this power was used cautiously in Australia . It has faded in most developed common law countries during the course of this century in harmony with expanded notions of free speech. One liberal High Court judge in Australia, Justice Lionel Murphy, suggested fifteen years ago that there was actually insufficient, and not excessive, attention to the courts and their importance to the government of the country. Going back to the good old days when politicians, the media and others would show respectful obeisance to the judges, confining their criticisms to private mutterings is now an

impossibility. In any case, when explored, those old days included some political and personal attacks, admittedly rather more muted than of recent times.

2. *Inevitability:* In a free society some criticism of the judiciary is inevitable. This is especially so at a time when there is a growing appreciation of the inescapable choices which fall to judges (particularly in the highest courts). It is naive to expect that commentators will be silent about such choices. Just as decisions of the other branches of government attract criticism and occasional calumny, important and controversial decisions of the courts will inevitably do the same. Into this milieu has been injected the technology of the modern media of communications. In his lecture on this subject, the Chief Justice of New South Wales reflected on the politics of law and order:

> "It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television programmes depicting casualties with unprecedented visual and emotional impact. To an extent, a similar phenomenon may account for the fact that modern citizens have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims or relatives of victims of violent crime, telling their stories and being asked whether they are satisfied with the sentences imposed on convinced offenders. Talk-back radio programmes are filled with people expressing feelings of insecurity and demanding ever-increasing severity of penalties. To all of this politicians respond by competing with each other to be seen to be tough on crime."

The same phenomena impose unrealistic expectations on police. It is an inescapable feature of the information world we are living in. The media encourage conflict, dramatic visual images, demands for instant solutions. Uncomfortably for the judiciary, they are locked into a profession whose mission is to serve the ages, not the instant sound-bite or spin considered appropriate to most of the actors in the other branches of government and most of the contemporary media.

3. *Some good:* Some of the heightened attention to the courts and their doings is justifiable; some desirable. The principle of public justice and open courts is designed constantly to submit the judges themselves to public scrutiny. Incompetent, dilatory, ill-tempered, prejudiced judges may deserve to be exposed so long as the object is truth not just entertainment at the behest of a disgruntled litigant whose views are given currency at the expense of a judge who cannot effectively answer back. A lot of criticism of courts and of the legal profession itself is perfectly healthy. Judges are citizens too. They live in their communities. It is right that they should be alert to community feelings. It would be naive to declare that they are completely unaffected in their professional decisions by the public debates which swirl around them. But what is expected is that, when the crunch comes and a serious attack is made on vulnerable people, the courts will uphold the law and the Constitution. The High Court of Australia did exactly this in 1951. In the midst of the Korean War, the Red scare and an enormous public fear of communists and communism, the Court struck down as unconstitutional the *Communist Party Dissolution Act.* That Act had been enacted by the Australian Parliament, proposed by a government which had a specific electoral mandate to do so. A referendum to authorise amendment of the Constitution to overcome the decision was defeated. Although the Court was criticised by some at the time, the politicians faithfully accepted the decision. There was

none of the ferocity of comment that has lately been voiced against the Court. It would not have occurred and any criticism would have been of the decision or the reasoning, not of the judges personally.

It is because courts are obliged to protect the rights of unpopular individuals and minorities that they are exposed, in elected democracies, to political castigation. If judges are to perform their functions when the going gets rough, they need tenure to underwrite their independence. Personal courage may not always be enough. Even with tenure, ambition or thirst for popularity may sometimes get in the way. Judges may sometimes wilt under the barrage of criticism, as Judge Baer appeared to do.

4. *Some too far:* Having acknowledged the legitimacy of public debate about cases and issues, criticism of decisions and attention to judges who are lazy, slow, incompetent or rude, it remains to be said that the current level of political and personal attacks on the judiciary is unacceptable. It has gone too far. Unless there is a measure of mutual restraint, the judicial institution will be damaged and judicial integrity undermined. When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who should know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention. Generally, judges cannot answer back. At least most cannot do so in effective forums. From inexperience their attempts to respond sometimes result in compounding their problems and demeaning their office.

In Australia, where neither federal nor State judges are subject to election, recall or popular removal, new developments have been occurring which are a source of added concern. State courts and State and federal tribunals have been abolished and targeted members not reappointed to the successor body. Independent office-holders who criticise governments may find that their statutory powers are diminished. In the wake of the recent controversies in Australia, proposals have been made, for the first time, that judges should be appointed for a term of years or chosen with participation of the people. The retirement from the High Court of Australia of two of the seven Justices and the pending retirement of the Chief Justice on attaining the constitutional retiring age of 70 years, led to a declaration by the Deputy Prime Minister of Australia, that the Government would appoint "capital C conservatives" to replace the retirees. Governments in Australia are not subject to Senate confirmation hearings for their judicial appointments. They can appoint whom they choose. They have always been entitled to make judicial appointments with reference to what they hope may be the appointee's philosophical inclinations. But in Australia we have not, until now, had such a clear indication that ideological leaning, rather than professional reputation or intellectual merit, will be the chief criterion for appointment to judicial office. Needless to say the comment drew much criticism. The Federal Attorney-General, by an unprecedented procedure of consultation, has tried to repair the impression that the political inclinations of candidates rather than their ability and independence will be the chief criterion for appointment to the nation's highest court.

5. *Some bad:* Distinctly bad have been the following features of the recent attacks on the judiciary. The personal targeting of identified judges. The attempt to intimidate them or

to deflect them from fidelity to their oath of office to decide each case strictly on its merits. The unrelenting character and partisan political aspect of the attacks of the last decade. Little wonder, that some good judges prefer to resign. Small surprise that good people of independent mind now refuse judicial appointment. Once proud and famous courts are criticised for buckling under to political pressure. Another feature of the barrage which should not pass unnoticed is the way in which women judges have tended to be singled out for special attack, whether in the United States, New Zealand or in my own country. Targeting judges, identifiable because of their sex, race or other minority considerations, attacking them by over-simplified and often inaccurate generalisations, panders to public prejudice. It reinforces stereotypes about the judiciary. Such conduct is unworthy of countries that claim to uphold fundamental rights and the rule of law.

WHAT CAN BE DONE?

1. *Unacceptable responses:* In the face of the barrage, and under fire, there are a few strategies available to the judiciary. It is worth listing them. Some of them can be put out of account as unworthy or impossible of attainment. Unworthy would be a judicial response to just cave in to the pressure and to do exactly what the politicians, editorialists or other powerful interests want. This would be a complete abdication of the judicial function. It would be out of line with constitutional and legal requirements and with our traditions. Although other judicial models exist, those countries, like Australia and the United States, which have chosen the path of a strict separation of the judicial power assert that the judiciary, and not the legislature, is the ultimate arbiter on political power. For judges of this tradition, caving in is out of the question.

So is ignoring the barrage in the hope that it will diminish or go away. There are limits to what the judiciary itself can do to respond to its critics. Within those limits, judges should certainly try to correct misapprehensions and insist upon the truth. Collectively and individually they have an ultimate duty to protect the integrity and independence of the judicial institution. Because they spend their days hearing both sides of conflict and searching for the rational resolution of difficult problems, judges and other lawyers tend to feel specially uncomfortable in simply putting up with false criticism and mis-information. Yet putting one's head above the ramparts can be risky. An interesting article on law review publications by judges of the United States Court of Appeals compares the pattern before and after the Senate confirmation hearings concerning Judge Robert Bork's nomination to the Supreme Court of the United States. The analysis concludes that publishing by such judges declined significantly following the Bork hearings. Judges with established reputations, particularly, appear to have observed and learned. This may not necessarily be a desirable result. Is it better to appoint a silent and unproductive nominee whose value system is completely unknown rather than one who has contributed to intellectual debate, exposed his or her ideas and demonstrated courage in sharing jurisprudential opinions with the legal profession and beyond? Driving candidates for judicial preferment into complete silence may simply promise more uncomfortable surprises when the Pandora's box of judicial appointment or promotion is reached along a silent road.

2. *Court defences:* One solution, increasingly used in Australia and New Zealand, is the recruitment of media and public affairs officers to the service of the courts. They can help journalists, often working to strict deadlines, to report accurately important court decisions and to correct factual or legal mistakes where they occur. They can promote

more accurate media commentary about the law and its personnel. In short, they can become informed. There are dangers in playing the media's game. Its mission will never be the same as that of the judges. Courts have no business cultivating political or public favour. They would always lose in a competition with the political branches which inevitably enjoy greater experience and resources. Courts would be diminished if they felt obliged to defend their decisions beyond their published reasons by employing media "spin doctors" for that purpose. But it must be admitted that those reasons are often obscure and highly technical. Perhaps, by failing to provide user friendly and public friendly summaries and by insufficient attention to the necessities of communications in the age of informatics, judges have brought on themselves some of the confusion which they criticise so readily in others.

3. *CJ's response:* It seems now to be an accepted obligation of Chief Justices and other senior judges to respond, on behalf of their courts, to attack on the courts, their judgments, their personnel or the administration of justice itself. Chief Justice Rehnquist did so during the last United States presidential campaign. Justice Stevens did so at the American Bar Association meeting in August, 1996. Such statements may quieten the barrage for a time. Chief Justice Brennan has done so in Australia, joined from time to time by Sir Anthony Mason, his distinguished predecessor. But judges are generally too busy. They usually lack the skills to mix it with political or other critics. They typically share a concern that an endeavour to do so would diminish them and their office. This concern is not misplaced. Reticence in public debate and controversy is what citizens generally expect of their judges.

4. *The Bar:* It therefore rests increasingly on the organised legal professional to defend the judiciary, to correct blatant misinformation and to remind politicians, the media and others of the precious heritage of judicial neutrality and independence which we have enjoyed until now. For the United Nations, I have worked in a number of countries where independence and incorruptibility are not ordinary features of the judiciary. It is important that institutional protection for those features should be maintained. Political attempts to undermine them should be rebuffed. Where necessary, the Bar should move for the disqualification or non-appointment of persons with committed positions on issues likely to come before the courts. Leaders of the legal profession, whatever their own general political persuasion, should speak up where judges are unfairly criticised by politicians and others for doing their independent duty. The Attorney-General, as the traditional leader of the legal profession, should do so in appropriate cases. In Australia, at least in part, the Federal Attorney-General has lately evidenced a willingness to return to this traditional role and even to criticise his Ministerial colleagues in the process. In the United States, somewhat belatedly, Attorney-General Janet Reno expressed her concern at "the increasingly heated rhetoric surrounding the debate" about so-called judicial activism. Attorney-General Reno acknowledged that judges today "must have thick skins". She condemned the way recent debates had not sought to argue "the rightness of an issue but to undermine the very credibility of the judiciary". The temperature of the debate elicited "alarm" on her part. The word is not too strong. She noted delays by the Senate in considering the large number of judicial nominations awaiting confirmation. Those delays appear to have become caught up in partisan political issues. So perhaps has the related question of maintaining judicial remuneration.

5. *Political mutual respect:* Statements of this kind from a leading political figure such as the Attorney-General are to be welcomed. But generalities given voice months after an attack are no substitute for specific defence of particular judges when they are under political or personal attack for performing no more than their judicial duties. It is then that strong political leadership of a principled kind is required. The increasingly adversarial and combative nature of our societies should not become endemic to the damage of the relationship of the judiciary with the other branches of government. Legislators, members of the Executive Government and the judiciary should all realise that each branch has its own part to play, without which constitutional government would be impossible. But what the political branches of government have to understand (as formerly, I believe, their members generally did) is that it would be an abdication of their constitutional functions for judges to court popular opinion for preconceived views applicable to cases in the courts or to swing abjectly in the wind of the latest popular mood. It was out of recognition of that danger that, when the people of England banished King James II from the Kingdom in 1688, they only invited his successors, William and Mary, to take up the Crown upon conditions. One of the conditions was judicial tenure and independence. When this principle, accepted for Britain, was not extended equally to the English colonies, the colonists and settlers complained and, in America, rose in revolution. They instituted, at least in the federal judiciary of the United States, a firm guarantee of tenure and independence for the judiciary. We in Australia are the happy beneficiaries of these two revolutions of 1688 and 1776. But it is necessary for judges and lawyers to remind their fellow citizens of the causes of those revolutions, the importance of maintaining the principles which were thereby secured and the dangers involved in expecting judges to decide cases on whether their decisions will be popular or not.

6. *Education in civics:* Sadly, papers such as this and occasional judicial speeches at law conferences will not repair the mischief that years of concerted attack on the judicial institution and individual judges can cause. Such attack often portrays a fundamental lack of understanding of what judges do, what they do not do and even why they exist in our kind of society. Such basic misapprehensons may not be curable in mature adults. The remedy should start in the schools and through the media. It should not be confined to law faculties and learned institutes. A renewal in the teaching of civics for all citizens would be timely. Let it be a goal of the coming millennium that we re-teach the lessons of our constitutions and engender an informed appreciation of the judges and of their vital importance for the peaceful government of us all. Not blind or uncritical faith. Not confidence extracted by the ever present threat of legal enforcement. Not appreciation won by clever public relations and media hype. But a deserved evaluation of faithful and honest service in a difficult profession, the alternative to which is anarchy and the power of guns.

ABSTRACT

In this paper Justice Kirby of the High Court of Australia reviews contemporary evidence of increasing attacks, many personal, on members of the senior judiciary in several common law countries. The phenomenon is illustrated by reference to instances in England and New Zealand, as well as in Australia and the United States. The author traces the patterns of commentary about the

judicial institution and individual judges by politicians, the media, academic commentators and others. From these comments he derives certain general conclusions.

In each of the countries mentioned, there has always been a level of criticism. Some criticisms are inevitable. Some are deserved. Some play a beneficial role. However, recent personal and political attacks, in particular, have gone too far. They have sometimes been designed to erode the essential independence of judges, even to attempt to intimidate judges or to affect the outcome of cases and to diminish their complete neutrality and integrity.

The author examines possible responses to this phenomenon. He rejects ignoring the attacks or, still worse, succumbing to them. Chief Justices and senior judges have a role to respond and to defend the courts and their judges. So does the organised legal profession. Appointment of court media officers and new attention to communication of judicial opinions is mentioned. Political leaders, including the Attorney-General should defend the judicial institution and individual judges when they come under improper personal and political criticism for doing their duty. Enhanced community eduction in civics - to promote a better understanding of the work judges do, and the importance of safeguarding their independence, is urgently required to raise the tone of the recent debates.